

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1446

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

v.

GILBERT FRIEDMAN,

Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

APPELLANT'S BRIEF

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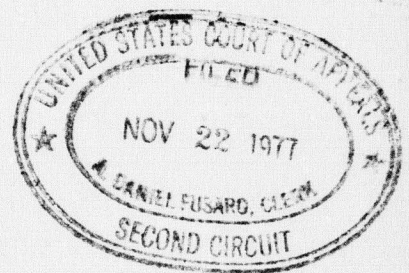


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STATEMENT OF ISSUE PRESENTED
FOR REVIEW

Whether the guilty plea of Gilbert Friedman should be
vacated pursuant to 28 U.S.C. §2255.

STATEMENT OF CASE

Nature of Case

This is a cause of action pursuant to 28 U.S.C. §2255 whereby your petitioner seeks to withdraw his plea of guilty or, in the alternative, to be resentenced due to the denial of his constitutional right of due process.

Course of Proceedings and Disposition

In the latter part of 1975, an investigation was conducted by the Drug Enforcement Administration into the activities of both Alan L. Gassberg and Gilbert A. Friedman. As a result, on or about the 16th day of December, 1975, a complaint was filed in the District Court, for the Southern District of New York, charging your petitioner

with a violation of 21 U.S.C. sections 812, 841(a)(1), 841 (b)(1), and 846. Your petitioner was represented at that time by one Allan Passin, Esquire, of 521 Fifth Avenue, New York, New York. Bail was set and your petitioner was released.

On April 29, 1976, an indictment was filed (76 Cr. 441) charging your petitioner with violation of the above-noted sections. On May 6, a not guilty plea was entered and the case was assigned to District Judge Kevin T. Duffy. A pre-trial conference was held on July 14, 1976, and trial was set down for August 9, 1976.

On July 27, however, Gilbert Friedman withdrew his not guilty plea and pled guilty to the first count of the indictment (conspiracy to possess narcotic drugs with intent to distribute). On September 17, Judge Duffy sentenced your petitioner to three years in prison with three years of special parole. All other counts were dismissed.

Your petitioner subsequently failed to file a notice of appeal although further motions were made pursuant to Rule 35. All have been denied.

On or about the 3rd day of March, 1977, your petitioner filed a motion pursuant to 28 U.S.C. §2255 to withdraw his plea, or in the

alternative, to be resentenced due to the denial of his constitutional right of due process. More specifically:

1. His plea was not entered voluntarily;
2. He was denied effective assistance of counsel; and
3. He was improperly sentenced pursuant to an inaccurate pre-sentence report.

This motion was denied in its entirety by the District Judge, Kevin T. Duffy, in a memorandum decision dated May 19, 1977. Your petitioner immediately filed a Notice of Appeal (dated June 1, 1977).

It is the contention of your petitioner-appellant that the holding of the District Court is in error and should be reversed in its entirety.

SUMMARY OF APPELLANT'S ARGUMENT

It is your petitioner's contention that the guilty plea herein was involuntary in nature pursuant to the McCarthy-Irizarry-Seiller triad and United States v. Journet.

Under Journet, Rule 11(c) of the Federal Rules of Criminal Procedure has been interpreted literally. Despite the contentions of the Respondent, the Second Circuit has applied Journet retroactively. United States v. Saft, Civ. No. 77-1143 (2d Cir., July 5, 1977). Specifically, in direct contravention of Rule 11(c):

- a. the nature of the charge was not explained;
- b. the mandatory minimum and maximum possible penalties were not explained;
- c. the defendant's right to be represented by counsel was not adequately explained;
- d. the defendant was not informed about his right against self-incrimination.

Yet, regardless of the application of Journet, as a general rule, before a plea can be accepted, it must be quite clear that the defendant understands the charges. Otherwise, a finding of unconstitutionality will result. Boykin v. Alabama, 395 U.S. 238 (1969).

Rule 11 therefore requires that the judge ascertain on the record that the plea being entered is truly voluntary in nature based upon the defendant's understanding of the law. McCarthy v. United States, 394 U.S. 459, 466 (1969); Santobello v. New York, 404 U.S. 257, 261 (1971).

In the Second Circuit McCarthy and Santobello have been strictly construed. Thus, with respect to a guilty plea to a conspiracy to distribute drugs, the Circuit Court has specifically held that

" . . . while the court need not explore every nook and cranny of conspiracy law before accepting a guilty plea, it must at least set out the bones elements of the offense. At a minimum, a defendant. . . (should understand) that such a charge requires proof of an agreement between two or more persons to commit an offense. . . ; Knowledge of the existence of a conspiracy; and an intent to participate in the unlawful enterprise." Irizarry v. United States, 505 F.2d 960 (2d Cir. 1975).

See also, Rizzo v. United States, 516 F.2d 789 (2d Cir. 1975). Cf., Seiller v. United States, 544 F.2d 554 (2d Cir. 1975).

In the case at bar, a study of the hearing minutes reveal that District Judge Duffy never fully explored the nature of the charges. Though exploration of the plea itself by the accepting judge is a requirement, Rule 11 was not followed.

Of further interest to the instant case is the fact that a defendant must understand the full consequences of his plea, See, e.g., Saddler v. United States, 531 F.2d 83 (2d Cr. 1976). A full explanation

of special parole is inexplicably missing from the plea minutes. Additionally, upon acceptance of the plea, Judge Duffy indicated that two years special parole could be granted instead of the three years required by law. This surely requires vacation of the sentence herein. See, e.g., United States v. Richardson, 483 F.2d 516 (8th Cir. 1973). Cf. Michel v. United States 507 F.2d 461 (2d Cir. 1974).

Additionally faced with poor representation (see below) and the pressures of the sentencing date, it is quite clear that the defendant's alleged waiver was coerced rather voluntary. United States v. Tateo, 214 F.Supp. 560 (D.C.N.Y. 1963).

It is also abundantly clear that a defendant has a right to effective assistance of counsel. Reece v. Georgia, 350 U.S. 85, 90 (1955). In general, this means that legal assistance was adequate enough so as not to ". . . be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied 338 U.S. 950 (1950). See, e.g., United States v. Joyce, 542 F.2d 158 (2d Cir. 1976). But, it is suggested to this court that it is the better rule to use the test set down by the District of Columbia Circuit, and nearly every other Circuit, whereby the question is whether the gross incompetence has blotted out the essence of a substantial defense. Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970).

Regardless, trial counsel failed to reach even minimal levels of effectiveness in that a Notice of Appeal was not filed within the ten days prescribed by Rule 37(a)(2).. The frustration of this basic right in and of itself requires the plea and the sentence to be vacated. See, e.g., Collins v. United States, 418 F. Supp. 577, 581, (E.D.N.Y. 1976).

Although trial counsel is not expected to be a non-failing purveyor of the percentages of conviction, he is expected to perform more than a cursory investigation. Motion practice is also vital to assure correct tactical procedures. Cf. Massimo v. United States, 331 F. Supp. 519 (D.C.N.Y. 1972), aff'd 463 F.2d 1171 (2d Cir. 1972), cert. denied 409 U.S. 1117 (1973).

In order to pursue this course, defense counsel should therefore arm himself with an exhaustive study of all the existent facts. If he has not adequately prepared, it is impossible for him to advise his client and the plea must be vacated. See, e.g., United States v. Moore, 529 F.2d 355 (D.C. Cir. 1976). In the case at bar, your petitioner was never informed of why a plea was necessary. Witnesses were never interrogated. Possible defenses were not explored. Thus, one must openly question the solution tactically taken by trial counsel.

A further defect herein was the improper reliance by District Judge Duffy upon an inaccurate pre-sentence report. It produced a picture of your petitioner quite different from his true nature. It neglected

the circumstances surrounding the alleged criminal acts. By claiming that he was a liar and financial manipulator, the pre-sentence report influenced the Court toward an incorrect course despite the protestations of counsel and the petitioner. This misinformation and misunderstanding rendered the entire sentencing procedure invalid as violative of due process. United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

Thus, these defects are of such a nature as to render the entire procedure unconstitutional prima facie or, in the alternative, they warrant a hearing. Sanders v. United States, 373 U.S. 1 (1963). See also, Farbo v. United States,

INTRODUCTION

Within the American system of jurisprudence, a writ of coram nobis

"...is used to attack a judgment of conviction that, although valid on its face, is nevertheless defective because of facts outside the record, where the defect is such as to deprive the defendant of his constitutional right to a fair trial." 18 Am.Jur.Trials "Coram Nobis Practice in Criminal Cases" §2.

It is the contention of your petitioner that the writ should be issued herein.

I

YOUR PETITIONER'S PLEA WAS NOT VOLUNTARY IN NATURE

A. GENERALLY

As a general matter, before a plea is accepted, the record should clearly reflect the defendant's understanding of the charges. Such clarity is required for "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect coverup for unconstitutionality." Boykin v. Alabama, 395 U.S. 238 (1969).

It is the position of your petitioner that the plea obtained herein was not voluntary in nature. Such a conclusion must adhere regardless of whether this Court chooses to apply the McCarthy-Irizarry-Seiller triad or its more recent pronouncement in United States v. Journet, 544 F.2d 633 (2d Cir. 1976). As a result, Gilbert Friedman's plea of guilty must be vacated since it was unfairly obtained under such standards. Kercheval v. United States, 274 U.S. 220 (1927).

B. YOUR PETITIONER IS ENTITLED TO THE RELIEF SOUGHT HEREIN BECAUSE THE COURT FAILED TO COMPLY WITH RULE 11(c) AS PER UNITED STATES V. JOURNET.

1. Generally

Under Rule 11(c) of the Federal Rules of Criminal Procedure, certain specific steps must be taken by the Court before a plea of guilty can be accepted. This procedure was established in response to a plethora of cases interpreting the necessary detail required of trial judges when taking a plea of guilty.

The Rule, as amended today:

Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

Although adopted on July 31, 1975, the Rule's effective date was delayed until December 1, 1975, in order to allow district judges, prosecutors and defense attorneys to become familiar with it.

2. The Second Circuit Requires Strict Compliance with Rule 11

In the significant case of United States v. Journet, 544 F.2d 633 (2d Cir. 1976), Circuit Judge Mansfield presented this Court's application of the amendments to Rule 11. As a general proposition, Rule 11 mandates a specific procedure whereby:

". . .before accepting a guilty plea each district judge must personally inform the defendant of each and every right and other matter set out in Rule 11. Otherwise, the

plea must be treated as a nullity." Id.
at 636.

The Court rejected the more liberal interpretation advocated by the government in noting that:

"Since a guilty plea amounts to a conviction which may have most serious consequences for the accused. . .the acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. Fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless." Id.

Thus, the concept of harmless error is rejected.

Since the decision in Journet (November 1, 1976), this Court has been faced with several opportunities to reject or merely modify this strict directive. Yet, despite such opportunities, the Court has undeniably declined to reverse itself. United States v. Michaelson, 552 F. 2d 472, 478 (2d Cir. March 3, 1977); Del Vecchio v. United States, 556 F.2d 106 (2d Cir. May 24, 1977). See also, United States v. Coronado, 554 F.2d 166, 174 (5th Cir. June 16, 1977); United States v. Aldridge, 553 F.2d 922 (5th Cir. June 9, 1977), United States v. Boone, 543 F. 2d 1090 (4th Cir. 1976).

What the Circuit Court has held is that compliance with Rule 11 does not require a

". . .reading (of) the specified items in haec verba. Congress meant to strip district judges of freedom to decide what they must explain to a defendant who wishes to plead guilty, not to tell them precisely how to perform this important task in the great variety of cases that would come before them. While a judge who

contents himself with a general application of the Rule will hardly be reversed, it cannot be supposed that Congress preferred this to a more meaningful explanation, provided that all the specified elements were covered." United States v. Saft, Civ. No. 77-1143 (2d Cir. July 5, 1977).

It is the contention of your appellant that the Journet-Saft test applies herein and has not been met by the District Court in the case at bar.

3. The Journet-Saft Standards Apply In The Case At Bar

It is the position of the government that Journet has only prospective effects and therefore the less restrictive rule of Kloner v. United States, 535 F.2d 730, 734 (2d Cir. 1976), cert. denied ___ U.S. ___, 97 S.Ct. 361 (1976) controls herein. See Brief for Respondent, at footnote pp. 15-16 (A-114). District Judge Duffy, fearful of the retroactive impact of Journet, supported this position in denying the petitioner's application in the Court below (A-148). Your appellant respectfully disagrees..

The government has incorrectly interpreted the application of Halliday v. United States, 394 U.S. 831 (1969), pet. for reh., 395 U.S. 971 (1969) in the case at bar. In Halliday, the Supreme Court rejected the retroactive application of McCarthy v. United States, 394 U.S. 459 (1969) by which guilty pleas accepted in violation of Rule 11 had to be vacated. Yet, in so concluding the high court specifically noted

that application of Rule 11 as per McCarthy was not constitutionally based and therefore prospective utilization was sufficient. Id. at 832.

In contrast, the Second Circuit has seemingly modified its previous holding that Rule 11 was not constitutionally based. Kelleher v. Henderson, 531 F.2d 78 (2d Cir. 1976). Journet clearly asserts that a plea of guilty involves the waiver of ". . . fundamental constitutional rights. . ." Id. at 636. Under such circumstances the Supreme Court has prescribed retroactive application of new rules. See e.g., Stovall v. Denno, 388 U.S. 244 (1967).

Moreover, this Court has specifically indicated that "Congress did not intend to authorize district judges to defer compliance with the detailed requirements of amended Rule 11(c) until the Court of Appeals for their circuit directed them to do so." United States v. Saft, 77-1143, slip op. 4599, 4609 (2d Cir. July 5, 1977). Thus, this Court has applied the effective date of the amended Rule 11 (December 1, 1975), rather than the decision day of Journet (November 1, 1976) as its measuring point of retroactivity. United States v. Michaelson, 552 F.2d 472, 477 (2d Cir. March 31, 1977); Del Vecchio v. United States, 556 F. 2d 106, (2d Cir. May 24, 1977). See also, United States v. Boone, 543 F. 2d 1090 (4th Cir. 1976).*

*Perhaps this Court might note Mr. Justice Douglas' comment that ". . . a constitutional rule made retroactive in one case must be applied retroactively in all. . . Equal justice does not permit a defendant's fate to depend upon such a fortuity." United States v. Peltier, 422 U.S. 531, 543 (1975).

4. In The Case At Bar, The District Court Failed To Adhere To The Requirements of Amended Rule 11.

Despite the directives of Rule 11(c), His Honor, Judge Duffy, failed to meet its standards in several specific areas as a study of the Plea Minutes of July 27, 1976 (A- 62) reveals.

More specifically:

- a. The nature of the charge was not explained.

The nature of the charge here (conspiracy) is a complex one. Rather than seek to clarify this in simple terms, Judge Duffy merely read the charge to the defendant. (A- 64).

Furthermore, although trial counsel (Mr. Passin) waived the reading and claimed that it had been explained to Mr. Friedman (A- 63), in reality, it had not been. Your petitioner asserts under oath that discussions were minimal and that the charges were never explained. (A-166).

- b. The mandatory minimum and maximum possible penalties were not explained.

His Honor specifically informed Mr. Friedman that he ". . . could go to jail for five years and pay a \$10,000 fine and two years special parole. . ." (A- 65). Yet in reality your petitioner faced a maximum five year sentence and/or a \$15,000 fine and a mandatory three years of special parole.

Considering the fact that the entire concept of special parole was foreign to Mr. Friedman, this was an especially damaging mistake.

- c. Defendant's right to be represented by counsel was not adequately explained.

Unlike the defendant in Soft, your petitioner had hired trial counsel. Yet at plea he was faced with a monetary problem which restricted the possibility of proper advocacy.

In fact, as has been alleged from the first, when Mr. Passin discovered the defendant's inability to pay, friction

developed and resulted in inadequate representation. The concept of appointed counsel thereby took on new importance which made the trial court's lack of Rule 11 compliance in this area all the more damaging.

- d. The defendant was not informed about his right against self-incrimination.

The vital protection our constitution offers against self-incrimination is conspicuously absent from the plea minutes. As a result, detailed factual statements were supplied at the time of sentencing, significantly damaging your petitioner's future recourse.

Thus the very heart of Rules 11(c)(3) and (5) had been neglected by Judge Duffy. This significant factor was one of the important differences between Saft and Journet. It is this which distinguishes the instant matter from Saft and Michaelson.

C. IRRESPECTIVE OF THE APPLICATION OF JOURNET, RULE 11 HAS BEEN VIOLATED HEREIN

1. Generally

Under Rule 11 of the Federal Rules of Criminal Procedure:

"The Court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The Court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney." Fed. Rules Crim. Proc., Rule 11(d).

In McCarthy v. United States, 394 U.S. 459 (1969), the Supreme Court discussed the significance of Rule 11. The Court took note of the fact that:

"A defendant who enters such a plea (as per Rule 11(d)) simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Id. at 466 (1969).

To satisfy these Due Process requirements,

". . .the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." Santobello v. New York, 404 U.S. 257, 261 (1971).

Understandably, the Second Circuit has applied McCarthy quite strictly. As a general proposition, the Court requires that the record clearly indicate the defendant's understanding of the charges to which he is pleading. See, Seiller v. United States, 544 F.2d 554 (2d Cir. 1975); Rizzo v. United States, 516 F.2d 789 (2d Cir. 1975); Irizarry v. United States, 505 F.2d 960 (2d Cir. 1975). See also, United States v. Landry, 463 F.2d 253 (7th Cir. 1972); United States v. Cody, 438 F.2d 287 (8th Cir. 1971), cert. denied 409 U.S. 1010 (1971).

2. The criteria as per Irizarry and Seiller

In Irizarry v. United States, 505 F. 2d 960 (2d Cir. 1975), the defendant entered a plea of guilty to one count of conspiring to possess and distribute narcotic substances. Upon acceptance of the plea, the following colloquy ensued between the Court and the defendant:

The Court: Now, the charge to which you are pleading guilty, under the United States Code is a charge of conspiracy.

Now, you must tell this Court in your own words, what conspiracy you say you committed.

Defendant: Well, I know I was--that I was supposed to pick up at the time--

The Court: What's that?

Defendant: I knew what I was going to pick up. That it was cocaine.

The Court: You were going to pick up cocaine?

Defendant: Right.

The Court: Of course, you can't conspire with yourself.

Defendant: No.

The Court: In order to conspire, you have to have somebody else to conspire with, is that true?

Defendant: Yes.

The Court: Was there anyone else that you were working with in this agreement?

Defendant: No. I was told by someone else to pick up that package.

The Court: You were told by someone else to pick up that package?

Defendant: Yes.

The Court: And as a result of that conversation with someone else, you then did pick up the package?

Defendant: I went to pick it up and I was caught before I picked it up.

The Court: What's that?

Defendant: I was caught by the Federal agents.

The Court: You were caught. But you went with the--

Mr. Stechel:

Could we first--

The Court: From whom?

Defendant: This fellow named at the bar--

Mr. Stechel:

From whom did you pick up the cocaine?

Defendant: I went to a hotel room. The guy--Valenzuela. That's the name.

Id. at 963 n.1.

Although the District Court accepted the plea, a reversal was mandated by Irizarry's failure to properly discern the nature of the charges.

In directing a reversal, the Circuit Court, as per Smith, took note that

"Conspiracy is a somewhat complicated crime, and, while the court need not explore every nook and cranny of conspiracy law before accepting a guilty plea, it must at least set out the bare bones elements of the offense." Id. at 965-966.

This minimally requires that

". . .a defendant. . .not be allowed to plead guilty to conspiracy. . ., under 21 U.S.C. §846, unless he understands that such a charge requires proof of an agreement between two or more persons to commit an offense under. . .21 U.S.C. §801 et seq.; knowledge of the existence of a conspiracy; and an intent to participate in the unlawful enterprise." Id. at 966.

Although the Circuit Court was regretful, compliance with the admonitions of McCarthy required a reversal.

Further delineation of the above standards was offered by the Court in Seiller v. United States, 544 F.2d 554 (2d Cir. 1975). In Seiller, the defendant had pleaded guilty to three counts of conspiracy to violate 18 U.S.C. §2314; namely, the transportation in foreign commerce of stolen securities with a value of \$5,000, or more.

In accepting the plea, the District Judge had read the indictment, and in fact had specified each of thirteen overt acts for which Seiller had been indicted. Based upon the record, the Circuit Court distinguished Seiller from Irizarry in that

"Unlike Irizarry, the reading of these specific, detailed counts plainly spelled out to Seiller the requisite elements of the crimes with which he was charged; this was done. . .three times. Unlike Irizarry, Seiller acknowledged three times that he understood the respective charges. . .Unlike Irizarry, Judge Cooper established that Seiller had fully discussed each of the three charges with his attorney, that he had not held anything back from his attorney relating to the three charges, and that he understood everything his attorney had told him regarding his rights with respect to each of the three charges. . .Id. at 563.

The plea was allowed to stand.

Rather than rejecting Irizarry, the Court reaffirmed its position that Rule 11 is violated when:

1. the court fails to give an adequate explanation of the nature of the conspiracy;
2. the court fails to spell out the charge other than merely identifying its name (i.e. "conspiracy"); and
3. there is a total dearth in the record of anything indicating the defendant's comprehension of the nature of the offense for which he stands charged.

Id. at 563. Irizarry v. United States, 508 F.2d 960, 964 (2d Cir. 1975).

3. The Irizarry-Seiller Criteria have been violated in the case at bar.

As the plea minutes (A- 62 to A- 67) clearly indicate, Judge Duffy failed to explain the meaning of the conspiracy beyond a reading of

the charge itself. Although such a reading can at times be sufficient, such is not always the case. Rizzo v. United States, 516 F.2d 789 (2d Cir. 1975).

In the case at bar, the nature of conspiracy presents a peculiar problem which requires explanation by the trial court. Admittedly, Gilbert Friedman is not lacking in intelligence. Yet, he was a first offender and subjected to inadequate representation by Mr. Passin. As Mr. Friedman's affidavit (A-166) indicates

"My contact with Mr. Passin was limited to brief discussions we had prior to appearing before Judge Duffy. At no time were there any meetings outside of the courtroom. These discussions were related to what kind of sentence I would get. . ."

Thus, rather than indicating a level of criminal sophistication, your petitioner's interjections were dictated by his lack of understanding of what was occurring.

As in Irizzary, Judge Duffy in the case at bar:

1. Failed to clearly delineate the overt act; and
2. Failed to discern from the defendant whether the requisite level of understanding had been provided by trial counsel.

Nor does the prior plea of the co-defendant Gassberg offer solace herein. Just because a prior plea colloquy had occurred does not necessarily mean that Mr. Friedman understood all that occurred.

It is the position of your petitioner that each plea must stand upon its own merits. Each and every Rule 11 requirement must be complied with with each defendant.

D. YOUR PETITIONER DID NOT UNDERSTAND ALL THE CONSEQUENCES OF HIS
RULE 11 PLEA

In addition to the specific pronouncements of Rule 11, a defendant should have a full understanding of all the consequences of his plea. See e.g., United States v. Kattou, 54 760 (8th Cir. Feb. 3, 1977); Saddler v. United States, 531 F.2d 83 Cir. 1976); Bye v. United States, 435 F.2d 177 (2d Cir. 1976), rev'g 309 F.Supp. (Dist. Ct. S.D.N.Y. 1969), on remand, 53 F.R.D. 354 (1971). Cf. Serrano v. United States, 442 F.2d 923 (2d Cir. 1971), cert. denied 404 U.S. 844 (1971). This is especially pertinent as to sentences.

Of particular interest in the case at bar is the plaintiff's sentence to three years special parole. As District Judge Duffy incorrectly stated upon the plea herein:

"You know you could go to jail for five years and pay a \$10,000 fine and two years' (emphasis added) special parole? Do you understand that? Plea minutes (Dist. Ct. S.D.N.Y. July 27, 1976) p.4.* (A-65)

Yet upon sentencing your petitioner received three years of special parole. Sentencing minutes (Dist. Ct. S.D.N.Y. September 17, 1976), p.6. (A-68)

Despite the contentions of the District Court and the United States Attorney, it is still an inescapable fact that the defendant herein was not informed of the maximum sentence he could have received.

*Actually first offenders may receive a maximum sentence of five years and/or a \$15,000 fine. A minimum special parole term of two years is also provided. 21 U.S.C. §84 (b)(1)(B).

Under such circumstances, this Court has specifically held that ". . .where the transcript or other record of the sentencing proceeding fails to disclose that the judge informed a defendant of the consequences of his plea, the defendant must be permitted to replead." Ferguson v. United States, 513 F.2d 1011,1013 (2d Cir. 1975). See also, Bunker v. Wise, 550 F.2d 1155 (9th Cir. Feb. 8, 1977).

Furthermore, the standards supposedly approved by this Court in Aviles v. United States, 405 F.Supp 1374 (S.D.N.Y. 1975), aff'd 538 F.2d 307 (2d Cir. 1976), cert. denied 425 U.S. 961 (1976) are in reality the same as those in Ferguson since Aviles is clearly distinguishable on its facts.

In contrast to the defendant in Ferguson (and in the case at bar), Aviles was not a novice to the federal criminal justice system. In fact, he has several prior narcotics convictions for which he stood charged again. He had always been represented by the same experienced counsel (in his previous encounters with the Courts), so there was no reason to believe his attorney would fail to totally advise him as to the consequences of a plea. Finally, it was clearly developed on the record that Aviles could have received a twenty-five year sentence (he actually received a twelve year sentence and six years special parole).

Finally, your petitioner's reliance upon United States v. Richardson, 483 F.2d 516 (8th Cir. 1973) is far from misplaced despite Davis v.

United States, 417 U.S. 333 (1974).

Contrary to the contentions of the United States Attorney, the Eighth Circuit has not totally rejected Richardson in view of the Davis decision.

In fact, in United States v. Kattou, 548 F.2d 760 (8th Cir. Feb. 3, 1977), Richardson seems revitalized. In Kattou, the defendant sought to vacate his plea to conspiracy for failure to advise him of the mandatory special parole term he faced. In remanding the matter back to the District Court, it was noted that

" . . . the transcript of the guilty plea hearing shows that the petitioners were not then advised by the court of the maximum sentence to which they were exposed. . . Nor does the record show whether the petitioners were made aware of the maximum sentence by another source before they pleaded guilty, although the government's . . . response alleges that the petitioners were informed by defense counsel. . . " Id. at 762, n.3.

Cf. McRae v. United States, 540 F.2d 943, 945-47 (8th Cir. 1976), cert denied ___ U.S. ___, 97 S.Ct. 750 (Jan. 10, 1977).

In the case at bar, it has constantly been the position of your petitioner that trial counsel never fully explained the consequences of the plea (A-166, A-168). This was compounded by the incomplete and inaccurate assessment of the plea consequences by Judge Duffy. Unlike Aviles, Gilbert Friedman had no prior criminal conflicts. The misdirection of the trial court and inexperienced defense counsel were therefore particularly damaging and necessitate the vacation of the

plea herein.

E. YOUR PETITIONER'S PLEA OF GUILTY WAS COERCED

Despite the appearance of allegedly uncoerced answers to Rule 11 questioning, inquiry as to the voluntariness of the plea is not foreclosed. United States v. Tateo, 214 F.Supp. 560 (S.D.N.Y. 1963) As the Supreme Court long ago recognized, "It can hardly be questioned but that most persons on trial upon criminal charges are in a state of mental tension and apprehension." Kercheval v. United States, 274 U.S. 220, 224 (1927).

Thus, in the case at bar, the generally poor representation provided by trial counsel led the petitioner to plead guilty, despite his complete lack of understanding of the charges. As has been noted, and will be noted further, such a result arose out of ineffective representation and noncompliance with Rule 11.

F. SUMMARY

In sum, your petitioner's plea was not voluntary in nature for:

1. the court failed to comply with Rule 11(c) as per United States v. Journet;
2. irrespective of Journet, Rule 11 has been violated herein as per the Irizarry-Seiller standards;
3. your petitioner did not understand the consequences of his Rule 11 plea; and
4. the plea of guilty was coerced.

II

THE PETITIONER IS ENTITLED TO THE RELIEF SOUGHT HEREIN FOR COUNSEL
WAS SO INEFFECTIVE AS TO DENY GILBERT FRIEDMAN HIS CONSTITUTIONAL
RIGHT TO EFFECTIVE LEGAL REPRESENTATION

A. GENERALLY

The Supreme Court has definitively held that, in addition to a defendant's right to assistance of counsel, such counsel must be of an effective stature. See, e.g., Reece v. Georgia, 350 U.S. 85, 90 (1955). Although counsel need not possess the ability to flawlessly predict court decisions, the advice given should fall ". . . within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970).

As District Judge Duffy, and the United States Attorney, correctly indicate, the Second Circuit still retains the so-called "farce and mockery" test. It was in fact twenty-eight years ago that District Judge Smith articulated the concept that

". . . time consumed in oral discussion and legal research is not the crucial test of the effectiveness of the assistance of counsel. The proof lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255. . .

A lack of effective assistance of counsel must be of such kind as to shock the conscience of the

Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied 338 U.S. 950 (1950).

See, United States v. Joyce, 542 F. 2d 158 (2d Cir. 1976); United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974); United States v. Walker, 492 F.2d 1311 (2d Cir. 1974), cert. denied 417 U.S. 972 (1974); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), cert. denied 410 U.S. 917 (1972); United States v. Gonzalez, 321 F.2d 638 (2d Cir. 1963); Gomez v. United States, 371 F. Supp. 1178 (S.D.N.Y. 1974).

Yet, it is this test that is so increasingly under attack that merely one other circuit can truly claim to retain it. See, United States v. Dingle, 546 F. 2d 1378, 1380 (10th Cir. 1976); Johnson v. United States, 485 F.2d 240, 241-242 (10th Cir. 1973); Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970) cert. denied 401 U.S. 1010 (1971). See, also, 26 A.L.R.Fed. 218 (1976).

B. YOUR PETITIONER WAS DENIED REASONABLY COMPETENT ASSISTANCE OF COUNSEL WHEN GROSS INCOMPETENCE BLOTTED OUT THE ESSENCE OF A SUBSTANTIAL DEFENSE.

It is the contention of your petitioner that it is time that this Court re-evaluate its adherence to the "farce and mockery" standard and impose a realistic test more in line with the expansion of Sixth Amendment protections since Judge Smith's 1949 Wight decision.

See, e.g., United States v. Moore, 529 F.2d 355 (D.C. Cir. 1976). This has been the clear course of action of at least five Circuit Courts of Appeal (District of Columbia, Third, Fifth, Sixth, and Seventh), and most probably of four others (First, Fourth, Eighth, and Ninth). See, e.g., United States ex rel. Ortiz v. Sielaff, 542 F.2d 377 (7th Cir. 1976); Thomas v. Wyrick, 535 F.2d 407 (8th Cir. 1976); Burston v. Caldwell, 506 F.2d 24, 27 (5th Cir. 1975), cert. denied 421 U.S. 990 (1975); Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 159 App. D.C. 326 (D.C.Cir. 1973); United States v. Miramon, 470 F.2d 1362, 1363 (9th Cir. 1972), cert. denied 411 U.S. 934 (1972); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970); Braxton v. Peyton, 365 F. 2d 563 (4th Cir. 1966). There has even been movement in this direction by the Second Circuit. See, e.g., Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (2d Cir. 1976) (Oakes, C.J., dissenting).

More specifically:

1. Expansion of Sixth Amendment Rights

Effective assistance of counsel is a right predicated in both the Due Process Clause of the Constitution and in the Sixth Amendment. See, e.g., Wade v. United States, 388 U.S. 218, 227 (1967). Yet, the more stringent requirements of the latter necessitate adherence to reasonably competent representation in the context of a guilty plea.

McMann v. Richardson, 397 U.S. 759, 770-771 (1970). Application of this Sixth Amendment standard makes it clear "...that the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency." Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970).

It is necessary, therefore, to relegate the "farce and mockery" test to an existence in law merely "...as a metaphor that the defendant has a heavy burden to show requisite unfairness." Scott v. United States, 427 F.2d 609, 610 (D.C.Cir. 1970). In contrast, the more modernistic "substantial defense" standard accomplishes more viable results well in line with nearly thirty years of Supreme Court expansion of the Sixth Amendment.

2. Lack of Effective Criteria for Admission of Lawyers to the Federal Bar

In addition to the Sixth Amendment's expansion, a more stringent standard of competency is necessitated by the alarming lack of effective criteria for admission to the Federal bar.

It has in fact been well-documented by Chief Judge Irving Kaufman that too often attorneys before the Federal courts lack sufficient training to properly present their cases. See, e.g., Kramer v. Biloki, Decision No. 76-3921 (E.D.N.Y. Feb. 8, 1977).

To subject a citizen to the degradation of incarceration merely due to the fact that his ill-prepared counselor did not fall within the parameters of Wight seems incongruous when aligned with the realities

of present conditions. See, United States ex rel. Johnson v. Vincent, 370 F. Supp. 379, 388 (S.D.N.Y. 1974), rev'd 507 F.2d 1309 (2d Cir. 1975), cert. denied 420 U.S. 912 (1975).

Yet, this is not to state that your petitioner lacks sufficient reason to fall within the present Second Circuit test. On the contrary, regardless of the objective standard utilized by this Court, Gilbert Friedman was denied the effective assistance of counsel.

C. TRIAL COUNSEL FOR YOUR PETITIONER FAILED TO FILE A NOTICE OF APPEAL OR INFORM YOUR PETITIONER OF HIS RIGHT TO APPEAL

In the case at bar, your petitioner's trial counsel failed to file a notice of appeal within the requisite ten day period, and even failed to inform the petitioner of the existence of such right to appeal. As a result, your petitioner unintentionally failed to file the requisite notice. See, e.g., Coppedge v. United States, 369 U.S. 438, 441-442 (1962).

Both the United States Attorney, and His Honor Judge Duffy indicate that any frustration of Rule 37(a)(2) is irrelevant since no discernable basis of appeal exists. Yet, it is herein contended that

"...a determination as to the merit or lack of merit in petitioner's appeal is not a question which should concern this Court. Rather, the question is whether there has been a frustration of the right to appeal." Collins v. United States, 418 F.Supp. 577, 581 (E.D.N.Y. 1976), per Platt.

Rodriguez v. United States, 395 U.S. 327, 330 (1969); United States ex

rel. Williams v. LaVallee, 487 F.2d 1006 (2d Cir. 1973), cert. denied 416 U.S. 916 (1974); Riser v. Craven, 501 F.2d 381, 382 (9th Cir. 1974); United States ex. rel. Smith v. McMann, 417 F.2d 648, 654 (2d Cir. 1969), cert. denied 397 U.S. 925 (1970). Your petitioner need not state the grounds for his appeal, nor speculate on the likelihood of success in such an endeavor.

As your petitioner's affidavit has indicated, the viability of an appeal was never suggested by Mr. Passin (petitioner's trial attorney). In fact, all contact ended once trial counsel realized that your petitioner was destitute and could not pay further legal expenses.

As to the notice of appeal, it is a rather simple document routinely filed in many criminal matters. It would have been filed in the instant case if trial counsel were aware of such a procedure. In the alternative petitioner contends that he would have filed same if he had been so informed by his trial counsel.

D. TRIAL COUNSEL FAILED TO TAKE ADEQUATE PROCEDURAL STEPS

As a general rule, a mere disagreement or mistake concerning trial tactics by defense counsel does not provide a basis for the relief herein sought. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970). When a factual situation is overwhelming, the best defense attorney can do little. United States v. Katz, 425 F.2d 928 (2d Cir. 1970).

Yet, this does not mean that trial counsel need not perform only cursory functions. Before a client can be properly advised, all the facts must be brought forth. True, a study of the government's file is important but surely an independent investigation in a case of such magnitude should not have been disregarded. Cf. Massino v. United States, 331 F.Supp. 519 (D.C.N.Y. 1972), aff'd 463 F.2d 1171 (2d Cir. 1972), cert. denied 409 U.S. 1117 (1973).

Even an admission of guilty by the defendant does not preclude basic motion practice and the pursuit of a possible suppression issue. As your petitioner's affidavit indicates, the so-called "consented to" search of his apartment is not as clear a waiver as Mr. Passin's affidavit would indicate^(A-167). The papers presented to the District Court by trial counsel were devoid of any procedural investigation of possible exculpatory evidence despite the fact that the arraigning Magistrate D.J. Hartenstine noted "This complaint fails to show probable cause except by stretching (the) meaning of every word. . . ." (A-8). Thus, although trial counsel need not make fruitless motions, this was not a case where a suppression issue was necessarily damned to obvious futility. See, United States ex rel. Rosner v. Com'r, N.Y.S. Dep't of Corrections, 421 F.Supp. 781, 791-792 (S.D.N.Y. 1976).

Moreover, even if the lack of motion practice is not enough in and of itself to support a charge of ineffective counsel, it surely reaches a level of significance when combined with other factors needed

herein. See, e.g. United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970); United States v. Malcolm, 432 F.2d 809, 818 (2d Cir. 1970).

E. TRIAL COUNSEL LACKED SUFFICIENT KNOWLEDGE TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

The case at bar is once again an indication that the time is here where there must be specialized training in federal criminal trial advocacy. Although trial counsel might have been well-equipped to handle civil matters in his chosen field of law, he was lamentably ill-equipped to handle petitioner's case. "If we continue to assume that all lawyers are omniscient generalists, our criminal courts will doubtless see more such 'farces and mockeries of justice' as this." United States ex rel. Johnson v. Vincent, 370 F.Supp. 379, 388, (S.D.N.Y. 1974), rev'd 507 F.2d 1309 (2d Cir. 1975), cert. denied 420 U.S. 912 (1975).

This is not to contend that mere inexperience of counsel necessitates a finding of incompetency. See, e.g. Rastrom v. Robbins, 440 F.2d 1251 (1st Cir. 1971), cert. denied 404 U.S. 863 (1971). But it does indicate that there is a point when mere tactical error is more properly delineated as ineffective assistance of counsel. Cf., United States v. Garguilo, 324 F.2d 795 (2d Cir. 1963).

In order for counsel to reach a level of constitutional adequacy,

he must pursue a course of action to discover all the facts of the case. Any guilty plea should be advised as a last resort when further procedural tactics are notably useless. The reasons for such a course should be quite clear and easily discerned from a study of the record. Otherwise the trial court was incorrect in accepting such a plea and reversal is necessitated. See, e.g., United States v. Moore, 529 F.2d 355 (D.C. Cir. 1976).

In the case at bar, criminal trial inexperience prevented trial counsel from properly investigating the matter. Mr. Passim is not an experienced criminal attorney and was in fact your petitioner's business counsel. As the affidavit of Gilbert Friedman further notes (A-166, A-168), no investigative procedures were followed to discover defense witnesses or possible defenses. Discussions with the petitioner were sketchy at best and indicated a lack of understanding of possible suppression alternatives.

Mr. Passim's tactical solutions to the case at bar combined with his lack of criminal experience indicate the sub-standard nature of the legal defense provided your petitioner. See, e.g., United States v. Moore, 529 F.2d 355 (D.C. Cir. 1976); United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975); Cooks v. United States, 461 F. 2d 530 (5th Cir. 1972).

F. SUMMARY

Thus, your petitioner is entitled to the relief sought herein for the proceedings

1. were a farce and mockery of justice pursuant to the Wright test , and

2. denied your petitioner a substantial defense due to the gross incompetence of trial counsel.

More specifically, trial counsel

1. failed to file a notice of appeal or inform petitioner of said right to appeal;

2. failed to pursue adequate procedural steps; and

3. lacked sufficient knowledge of criminal law in order to provide effective assistance of counsel.

III

THE COURT LACKED ADEQUATE AND ACCURATE PRE-SENTENCE INFORMATION IN ORDER TO SENTENCE YOUR PETITIONER

It is imperative that the sentencing judge approach the subject with an open mind. He should be vigilant for defects in information presented to him because:

"Misinformation or misunderstanding that is materially untrue. . .as to any facts relevant to sentencing renders the entire sentencing procedure invalid as a violation of due process."
United States v. Malcolm, 432 F.2d 809, 818
(2d Cir. 1970).

See, also, Briscoe v. United States, 391 F.2d 984, 986 (D.C.Cir. 1968).

It has been the contention of your petitioner that the harshness of the sentence imposed (in contrast to his co-defendant who is on probation) was the result of significant inaccuracies presented to Judge Duffy via the presentence report.

Most notably, the government's version of the offense (as portrayed in the presentence report) characterized Friedman as a major drug dealer. Yet the defendant has continually claimed this to be untrue and that government report is, therefore, incorrect. Despite this serious inaccuracy, it was this uncorrected government version that Judge Duffy admittedly contemplated. Your petitioner was not afforded the opportunity of rebutting such untruths other than by statements at sentencing and a subsequent Rule 35 motion. Therefore, Judge Duffy is incorrect in his contention that ". . .the defendant has had a full opportunity to present his version of the offense." (A-160)

What has occurred in the instant case is that the sentencing Judge has had no manner of determining whose version is correct. Under such circumstances it is quite possible that incorrect facts precipitated the sentence imposed. Even if this were not the case, a hearing is the better course to assure that due process has been rendered. United States v. Battaqlia, 478 F.2d 854 (5th Cir. 1972). Cf. United States v. Jones,

473 F.2d 293 (5th Cir. 1973), cert. denied 411 U.S. 984 (1973).*

It is the position of your petitioner that such a hearing will reveal that the report utilized by Judge Duffy was filled with significant inaccuracies leading to the sentence imposed. As a result, the plea and resultant sentence must be vacated. Avery v. United States, 382 F.Supp. 649 (E.D.La. 1974), aff'd 511 F.2d 1400 (5th Cir. 1975). Cf. United States v. Arredo-Sarmiento, 545 F.2d 785 (2d Cir. 1976), cert. denied ___ U.S. ___, 97 S.Ct. 1330 (March 7, 1977); United States v. Herndon, 525 F.2d 208 (2d Cir. 1975).

IV

THESE FACTS WARRANT THE RELIEF SOUGHT HEREIN, OR, IN THE ALTERNATIVE,
A HEARING

Although these defects are sufficient on their face to warrant the relief so demanded, your petitioner is at least entitled to a hearing. In fact, unless it can be conclusively shown that the defendant's claim is without merit, a hearing on the matter is required. Sanders v. United States, 373 U.S. 1 (1963). See also, Farbo v. United States, 452 F.2d 132 (7th Cir. 1971).

*Your petitioner also contends that: (a) he was in no way a pathological liar or a financial manipulator; and (b) he was going through a very difficult period in his life both financially and with respect to his marriage. (A-76)

SUMMARY

1. Your petitioner's plea was involuntary in nature in that:
 - (a) it failed to comply with Rule 11;
 - (b) he did not understand all the consequences of his plea;
 - (c) his guilty plea was coerced.

2. Your petitioner was denied effective assistance of counsel in that:
 - (a) trial counsel failed to file a notice of appeal;
 - (b) trial counsel lacked Federal bar criminal experience;
 - (c) the court lacked adequate and accurate pre-sentence information in order to sentence your petitioner.

CONCLUSION

WHEREFORE, your petitioner's guilty plea and resultant sentence should be vacated and dismissed, or, a hearing on the matter be established, or such other and further relief be granted as to this Court seems just, proper, and equitable.

Respectfully submitted,

STEPHEN DAVID FINK
Attorney for Petitioner
Office & Post Office Address
125-20 Queens Boulevard
Kew Gardens, New York 11415
212-261-5550

AFFIDAVIT OF PERSONAL SERVICE

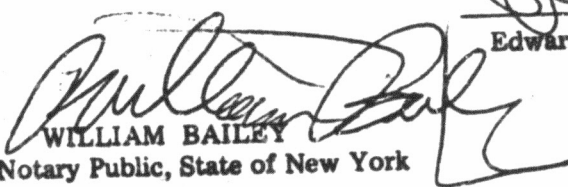
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of November, 19 77 at No 1 St. Andrews Place, NYC

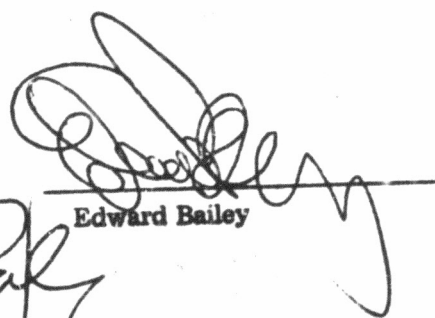
deponent served the within brief
upon U.S. ATTORNEY

the atty. for respondent herein, by delivering 2 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney for appellee : therein.

Sworn to before me this
22 day of November 1977 .


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978


Edward Bailey

AFFIDAVIT OF PERSONAL SERVICE

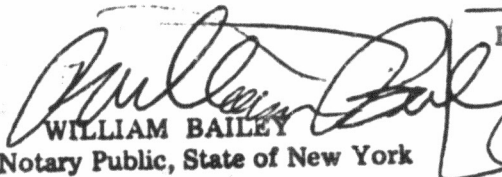
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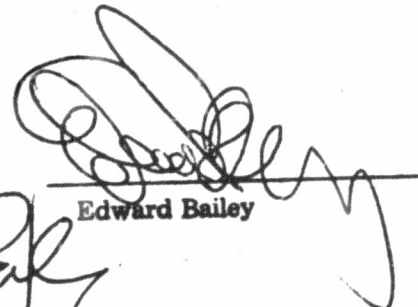
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